Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

RICHARD A. GIDDENS, Petitioner

v.

SHELL OIL COMPANY and
JACK TUCCI, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Melissa Hirsch
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Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a severe and pervasive pattern of verbal and physical abuse of a sexual nature visited upon a male employee by a heterosexual male supervisor and heterosexual male co-workers, which is based on sex stereotyping by said supervisor and co-workers and which results in a hostile and abusive working environment, is actionable under Title VII of the Civil Rights Act of 1964.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

RICHARD A. GIDDENS, Petitioner,

v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD A. GIDDENS, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 6, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, was entered on December 6, 1993, in Case No. 92-8533, and such decision is unpublished. Such opinion is reprinted in the Appendix below.

The prior opinion of the United States Court for the Western District of Texas,

Midland/Odessa Division, was entered on August 5, 1992, in Case No. MO-91-CA-098, and such decision is unpublished. Such opinion is reprinted in the Appendix below.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its judgment and opinion on December 6, 1993. Petitioner's Motion for Rehearing was denied on January 18, 1994. Jurisdiction is based on 28 U.S.C. 1541(c).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

42 U.S.C. §2000e-2. Unlawful employee practices.

(a) Employer practices. It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because

of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This is a hostile environment sexual harassment action brought by Petitioner RICHARD A. GIDDENS (hereinafter "GIDDENS"), a former employee of Respondent SHELL OIL COMPANY (hereinafter "SHELL"), Respondent JACK TUCCI (hereinafter "TUCCI"), a Shell Oil Company foreman, and Respondent CRAIG HARNER (hereinafter "HARNER"), a Shell Oil Company employee.

Factual Basis

From 1985 until May, 1991, GIDDENS was employed as an operator at SHELL's Odessa refinery. In 1988, SHELL assigned TUCCI as supervisor on GIDDENS' shift. TUCCI objected to personal characteristics which GIDDENS exhibited, such as softness and lack of aggressiveness, which TUCCI regarded as conflicting with his stereotyped view of what a male should be like. As a result, TUCCI engaged in a pattern of harassment and abuse which

included derogatory sexual comments and physical contact with GIDDENS' genitals. TUCCI enlisted another SHELL employee, HARNER, in his program of abuse. In early 1989, HARNER and TUCCI pushed GIDDENS into the corner of a restroom and "hunched on him like a couple of dogs". GIDDENS reported the attack to SHELL management, but SHELL management took no action. Approximately four to six months later, TUCCI and HARNER took their genitals out of their pants and rubbed them on GIDDENS. GIDDENS again complained to SHELL management, and again SHELL management took no corrective action. If anything, TUCCI increased the frequency of his harassment of GIDDENS.

The final, and certainly most heinous, incident of GIDDENS' two and one-half year ordeal occurred in February, 1991. TUCCI and HARNER came up behind GIDDENS as he was sitting in a chair and pinned him in the chair. TUCCI and HARNER then each grabbed GIDDENS' arms and legs and suspended him upside down in the air.

HARNER then rubbed GIDDENS' genitals and placed his finger in GIDDENS' rectum. GIDDENS reported this attack to SHELL management, who finally responded by terminating HARNER and forcing TUCCI to retire. By this time, however, GIDDENS had been seriously emotionally and physically damaged. SHELL placed him on disability leave a short time later.

The Rulings Below

The District Court entered judgment in favor of Defendants SHELL and TUCCI based on a jury verdict. As to GIDDENS' Title VII claim, however, the take-nothing judgment was based on the jury's negative answer to an improper interrogatory. Specifically, the jury was asked, "Do you find from a preponderance of the evidence that Jack Tucci made or threatened to make employment decisions affecting the employment status of Richard Giddens?" As the pleadings and proof clearly established a hostile environment sexual harassment claim rather than a quid pro quo sexual harassment

claim, this question was not an element of GIDDENS' case, yet GIDDENS was denied judgment thereby in spite of the jury's affirmative finding that GIDDENS had been sexually harassed.

GIDDENS filed his appeal with the United States Court of Appeals for the Fifth Circuit complaining of, among other things not germane to this petition, the "employment decisions" interrogatory cited above. SHELL responded with a cross appeal which stated, in essence, that the improper interrogatory was irrelevant because the District Court should have granted SHELL's Motions for Summary Judgment and Judgment as a Matter of Law on the grounds that GIDDENS had failed to state a claim under Title VII.

On December 6, 1993, a panel the United States Court of Appeal for the Fifth Circuit affirmed the take nothing judgments of the Trial Court. In pertinent part, the Fifth Circuit held that, "Harassment by a male supervisor against a male subordinate does not state a

claim under Title VII even though the harassment has sexual overtones." As a result of this ruling, the Fifth Circuit did not reach the question of the "employment decision" interrogatory. As noted earlier, GIDDENS' motion for rehearing was denied.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals has decided an important question of Federal Law in a way that conflicts with the applicable decisions of this Court.

In reaching its decision to affirm the Trial Court, the Fifth Circuit expressly held that there was no evidence to show how GIDDENS' employer treated him differently because he was male. This holding required an incorrect interpretation of three decisions of this Honorable Court.

In Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986), this Court expressly recognized that Title VII of the Civil Rights Act of 1964 supports a cause of action for hostile work environment sexual harassment. In reaching this conclusion, the Court clearly held

that Congress did not intend any distinction between purely economic discrimination and discrimination in other "conditions and privileges of employment", Id., at 63. Thus, hostile environment sexual harassment is not a judicially created remedy or analytical construct, but rather the recognition that, in accordance with the plain meaning of the statute, selectively imposing intolerable working conditions on the basis of sex (or any other prohibited criteria) is just as real a form of discrimination as disparate pay or the refusal to hire or promote. Logically, therefore, principles applicable to economic discrimination must also apply to hostile environment discrimination. In other words, a court deciding a "hostile environment" case may not justify disregard of a legitimate precedent of this Court merely because it was set forth in a case involving tangible economic benefits.

In the case at bar, GIDDENS was subjected to sever and pervasive sexual harassment by his

male supervisor and a male co-worker. The harassment was most certainly meant to demean, harass, and intimidate GIDDENS. The harassment clearly altered a condition of GIDDENS' employment and created a hostile work environment as contemplated by Supreme Court precedent. This severe conduct should not escape the purview of Title VII protection.

Title VII of the Civil Rights Act prohibits sex discrimination against men as well as women. Tomkins v. Public Service Electric and Gas Co., 568 F.2d 1044, 1046, n.4 (3rd Cir. 1972) citing Rosen v. Public Service Electric and Gas Co., 409 F.2d 775 (3rd cir. 1969). When that discrimination is in the form of severe sexual harassment which creates a hostile work environment, males are also protected. This Court, in Harris v. Forklift Systems, ___ U.S. ___ 114 S.Ct. 367 (1993), stated that the language of Title VII clearly evinces a congressional intent to "'strike at the entire spectrum of disparate treatment of men and women

in employment'", which includes requiring people to work in a discriminatory, hostile, or abusive environment. [Emphasis added.] citing Meritor, supra.

GIDDENS' evidence at trial clearly supports the conclusion that TUCCI and HARNER held a narrow, clearly defined, and undoubtedly archaic view of what a man must be. A man, in their view, must be rough and aggressive. The record is equally clear that GIDDENS' failure to measure up to this standard was, at the very least, a pivotal factor in his being targeted for harassment and abuse of a blatantly sexual nature which created a working environment for GIDDENS that was both hostile and intolerable. The Fifth Circuit's holding that this kind of evidence does not demonstrate conduct based on GIDDENS' sex is in direct conflict with an applicable decision of this Court.

In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989), this Court was confronted with a case wherein the employer was

alleged to have made an employment decision, at least in part, on the basis that a female employee was aggressive, although the employer apparently regarded this quality as desirable in its male employees. The Court held, "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender", Id., at 250. The Court further ruled that sexually stereotypical remarks are evidence that gender has been a consideration. Finally, the Court held that where improper consideration of gender is even a partial cause of the actions in question, a cause of action under Title VII exists, Id., at 241.

Because hostile environment harassment is a form of discrimination just as is failure to promote, there is no basis in logic, this Court's prior decisions, or the plain language of Title VII for not applying the principles of Price Waterhouse to a hostile environment case.

Neither is there any justification for not applying the same rules where the victimized employee is male rather than female. Accordingly, the Fifth Circuit's holding that there was no evidence that GIDDENS' gender was a cause of the harassment complained of is in direct conflict with this Court's holding that acting on the basis of a sex stereotype is acting on the basis of gender.

Further evidence of disparate treatment because of GIDDENS' gender is found in SHELL's responses to GIDDENS' repeated complaints. It is inconceivable that SHELL would have responded to similar complaints from a female employee by advising her to "hang in there a little while", and "eventually we'll rotate in a new supervisor".

Certiorari should be granted because the United States Court of Appeals for the Fifth Circuit, as well as other lower Federal Courts, has decided an important question of Federal Law which has not been, but should be, settled by this Court.

This Court has not expressly addressed the question of whether, and under what

circumstances, male victims of sexual harassment are entitled to relief under Title VII. Under the clear authorities of this Court and other courts, it is beyond question that GIDDENS would have a Title VII cause of action if he were female, Meritor Savings Bank, supra. The lower courts have been left to determine the thorny issues created by the differing genders, orientations, and personality traits of the respective parties. The results have not been uniform and demonstrate a tendency to draw unnecessarily fine distinctions in a decisional matrix based on the gender and sexual orientation of both supervisor and employee. For example, homosexuals may be discriminated against because of their sexual "preference" with impunity, Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979), Williamson v. A. G. Edwards and Sons, Inc., 876 F.2d 69 (8th Cir. 1989). Transsexuals have been lumped with homosexuals and bisexuals, Voyles v. Ralph K. Davies Medical Center, 403 F.Supp. 456 (N.D. Cal 1975), aff'd

570 F.2d 354, Holloway v. Arthur Anderson and Co., 566 F.2d 659 (9th Cir. 1977). If, however, the supervisor is homosexual, an employee of the same gender can recover under Title VII, Wright v. Methodist Youth Services, 511 F.Supp. 307 (N.D. Ill. 1981).

Perhaps the most absurd result that would be compelled by this gender/sexual preference matrix would be that of the bisexual supervisor. Such an individual would be free to sexually harass whomever he or she chose because his or her choices would presumably not be limited or influenced by the victim's gender, Baines v. Costle, 561 F.2d 983, 900, n.55 (D.C. Cir. 1977).

These gender/sexual preference distinctions are artificial, time consuming, and prompt unnecessary inquiry into the peculiar sexuality of the parties involved. These considerations can, and should be, eliminated by refocusing on whether the employer or supervisor pigeonholed the employee in a sexual stereotype and acted

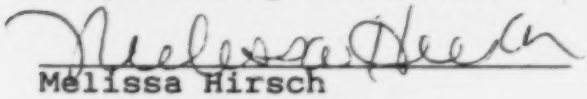
thereon. This refocusing cannot be achieved without the intervention of this Court.

Finally, this Court should act because the decisional matrix now so widespread among the lower courts does not adequately deal with the discrimination Title VII was enacted to eliminate. By not sanctioning sex stereotyping, the lower courts tacitly approve it and contribute to its perpetuation. A supervisor or employee who believes a man must be aggressive and/or a woman must not be and base his treatment of employees, even in part, on how they measure up to those prejudices is in no meaningful way different from one who is willing to provide equal employment opportunities to blacks, just so long as they exhibit an obsequious and subservient demeanor.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX

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UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8533

RICHARD A. GIDDENS, ET AL.,
Plaintiffs,
RICHARD A. GIDDENS,
Plaintiff-Appellant,
Cross-Appellee

versus

SHELL OIL COMPANY,
Defendant-Appellee,
Cross-Appellant,

and

JACK TUCCI,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Texas

(M-91-CV-98)

Before REAVLEY, DAVIS, Circuit Judges, and TRIMBLE,[1] District Judge.

---

[1] District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:[2]

Our review of the record and the relevant law in this case persuades us that the district court correctly entered a take-nothing judgment against plaintiff, Richard Giddens.

Giddens failed to state a claim for relief under Title VII. Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination. Giddens did not allege how his employer treated him differently because he was a male and he produced no evidence at trial tending to prove such facts. The district court, therefore, correctly dismissed Giddens' Title VII action.

Giddens' action for negligent infliction of

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[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

emotional distress and negligent hiring and supervision are barred by the Texas Workers' Compensation Act.

Giddens' claim for intentional infliction of emotional distress against Shell is precluded by the jury's finding that Tucci's acts were not committed in the course and scope of his employment.

We need not consider Giddens' claim for intentional infliction of emotional distress against Tucci, because Giddens has not complained about the district court's dismissal of his action against Tucci.

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

RICHARD A. GIDDENS, TRACY GIDDENS and RICHARD A. GIDDENS, JR. Plaintiffs	)	
VS.	)	CIVIL ACTION NUMBER MO91-CA-098
SHELL OIL COMPANY and JACK TUCCI Defendants	)	

FINAL JUDGMENT

This action came on for trial before the Court and a jury, Honorable Lucius D. Bunton, III, United States District Judge, presiding, the issues having been duly tried, the jury rendered the following verdict:

QUESTION NO. 1

1. Do you find from a preponderance of the evidence that Tucci and/or Harner acted intentionally or recklessly in their treatment of Richard Giddens?

   Jack Tucci ___X___ Yes _____ No

   Craig Harner ___X___ Yes _____ No

2. Do you find from a preponderance of the evidence that Tucci's and/or Harner's conduct was extreme and outrageous?

Jack Tucci ___X___ Yes _____ No

Craig Harner ___X___ Yes _____ No

3. Do you find from a preponderance of the evidence that Tucci's and/or Harner's conduct caused Richard Giddens emotional distress?

Jack Tucci ___X___ Yes _____ No

Craig Harner ___X___ Yes _____ No

If you have answered "Yes" to Question No. 3, please answer Question No. 4. If you have answered "No" to Question No. 3, please go on to Question No. 7.

4. Do you find from a preponderance of the evidence that the emotional distress suffered by Richard Giddens was severe?

___X___ Yes _____ No

5. Do you find from a preponderance of the evidence that the extreme and outrageous conduct of Jack Tucci was in the course and scope of his employment?

_____ Yes ___X___ No

6. Do you find form a preponderance of the evidence that the extreme and outrageous conduct of Craig Horner was in the course and scope of his employment?

_____ Yes ___X___ No

7. Do you find from a preponderance of the evidence that Shell acted negligently in any of the following

acts?

(a) Failing to property supervise Jack Tucci

__X__ Yes _____ No

(b) Failing to properly supervise Craig Horner

__X__ Yes _____ No

(c) Failing to fire Jack Tucci before February 1991

_____ Yes __X__ No

(d) Failing to fire Craig Horner before February 1991

__X__ Yes _____ No

If you have answered "Yes" to any part of Question No. 7, please answer Question No. 8. If you have answered "No" to each part of Question No. 7, please skip Question No. 8.

8. Do you find from a preponderance of the evidence that such act was a proximate cause of any injury to Richard Giddens?

_____ Yes __X__ No

If you have answered "Yes" to Question No. 4 or Question No. 8, please answer Question No. 9 and Question No. 10. If you have answered "No" to both questions No. 4 and Question No. 8, please skip Questions No. 9 and No. 10.

9. What sum of money, if paid now in cash, would fairly and reasonably

compensate Richard Giddens for his injuries, if any, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do no include damages for one element in any other element. Do no include interest on any amount of damages you find.

ELEMENT A. Physical pain and mental anguish in the past, in any.
ANSWER $ 5000 .

ELEMENT B. Physical pain and mental anguish which he, in reasonable probability, will suffer in the future, if any.
ANSWER $ 5000 .

ELEMENT C. Loss of earning capacity in the past, if any.
ANSWER $ 20,000 .

ELEMENT D. Loss of earnings in the future.
ANSWER $ 70,000 .

10. What sum of money, if paid in cash, would fairly and reasonably compensate Tracy Giddens for injuries, if any to her husband, Richard Giddens that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. do

no include damages for one element in any other element. Do not include interest on any amount of damages you find.

ELEMENT A. Loss of household services.

ELEMENT B. Loss of consortium.

"Household services" means the performance of household and domestic duties by a spouse to the marriage.

"Consortium" means the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, sexual relations, emotional support, love, and felicity necessary to a successful marriage.

Answer in dollars and cents for damages, or none, that were sustained in the past and that in reasonable probability will be sustained in the future.

ANSWER: None

11. Do you find from a preponderance of the evidence that Richard Giddens was sexual harassed by Jack Tucci?

ANSWER "YES" or "NO"

ANSWER: Yes

If you have answered Yes to Question No. 11 please answer Question No. 12.

12. Do you find from a preponderance of the evidence that the sexual harassment was sufficiently severe or pervasive to alter the conditions of Richard Giddens' employment and

create an abrasive working environment?

ANSWER "YES" or "NO"

ANSWER: Yes

If you have answered Yes to Question No. 12 please answer Question No. 13.

13. Do you find from a preponderance of the evidence that Jack Tucci made or threatened to make employment decisions affecting the employment status of Richard Giddens?

ANSWER "YES" or "NO"

ANSWER: No

August 5, 1992 — Dated

E. Sharon Dougherty — Foreperson

Based on the foregoing verdict, it is ordered and adjudged that the Plaintiff Richard A. Giddens recover of the Defendant Jack Tucci the sum of $100,000 upon the Plaintiffs' first cause of action for intentional infliction of emotional distress, with interest thereon at the rate provided by law, and the Plaintiffs' costs of this action.

It is further ordered and adjudged that all other causes of action asserted by the Plaintiffs Richard A. Giddens, tracy Giddens and

Richard A. Giddens, Jr., against the Defendants Shell Oil Company and Jack Tucci be dismissed with prejudice and that the Defendant Shell Oil Company recover its costs of this action from the Plaintiff Richard Giddens.

Signed this 2nd day of September, 1992 in Midland, Texas.

Lucius D. Bunton
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8533

RICHARD A. GIDDENS, ET AL.,
Plaintiffs,

RICHARD A. GIDDENS,
Plaintiff-Appellant,
Cross-Appellee,

versus

SHELL OIL COMPANY,
Defendant-Appellee,
Cross-Appellant,

and

JACK TUCCI,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING
(JANUARY 18, 1994)

Before REAVLEY, DAVIS, Circuit Judges and TRIMBLE, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

*District Judge of the Western District of Louisiana sitting by designation.

93-1758

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IN THE
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OCTOBER TERM, 1993

RICHARD A. GIDDENS,
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v.

SHELL OIL COMPANY,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court redefine the prohibition against sex discrimination contained in Title VII of the Civil Rights Act of 1964 to include any mistreatment of any employee, male or female, which involves any sexual connotation?

PARTIES TO THE PROCEEDING

1. Richard A. Giddens (hereinafter referred to as "Giddens"), Plaintiff in the District Court and Petitioner

2. Shell Oil Company[1] (hereinafter referred to as "Shell"), Defendant in the District Court and Respondent (hereinafter referred to as "Shell")

3. Jack Tucci (hereinafter referred to as "Tucci"), Defendant in the District Court . Note: Although Giddens has listed Tucci as a Respondent, Giddens did not appeal the dismissal of his action against Tucci by the District Court.

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[1] Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

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No._____

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Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case purports to involve a claim of sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Giddens is a former employee at Shell's Odessa Refinery. His claim is based on rough treatment, including language and actions with sexual connotations, by other male employees.

The case was filed in the United States District Court for the Western District of Texas on July 16, 1991. The case was tried to a jury on August 4 and 5, 1992. The jury returned a verdict in favor of Shell on all theories, including violation of Title VII. On September 2, 1992 a Final Judgment was signed dismissing all of Gidden's claims.

Giddens appealed to the United States Court of Appeals for the Fifth Circuit complaining, inter alia, of the form of

the questions submitted to the jury in connection with the alleged violation of Title VII. On December 6, 1993 the Fifth Circuit issued a per curiam decision affirming the judgment in favor of Shell. The Fifth Circuit held that Giddens failed to state a claim for relief under Title VII.

In the Petition for Writ of Certiorari Giddens complains that the Fifth Circuit erred in holding that Giddens must prove that he was treated differently because he is male in order to state a claim for relief under Title VII. Giddens requests that the Supreme Court redefine the prohibition against sex discrimination contained in Title VII to include any mistreatment of any employee, male or female, which involves sexual connotations.

CITATION OF OPINIONS

The Final Judgment of the United States District Court for the Western District of Texas dated September 2, 1992 was not published. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

The per curiam decision of the United States Court of Appeals for the Fifth Circuit dated December 6, 1993 was not published. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

APPLICABLE STATUTE

This case involves the correct construction of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. This statute is reprinted in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

(i)Course of Proceedings and Disposition in Courts Below

Giddens filed suit against Shell and Jack Tucci, a former Shell foreman, in the United States District Court for the Western District of Texas on July 16, 1991. The District Court had jurisdiction under 28 U.S.C. § 1331. The First Amended Complaint alleged eight causes of action, including a claim of violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. (R.vol.1 p.17).

The case was tried to a jury on August 4 and 5, 1992. The case was submitted to the jury on special questions. (R.vol.2 p.275). Based on the answers to these questions, a Final Judgment dismissing all of Gidden's claims was signed on September 2, 1992. (R.vol.2 p.293).

Giddens appealed to the United States Court of Appeals for the Fifth Circuit complaining, inter alia, of the form of the questions submitted to the jury in connection with the alleged violation of Title VII. Shell cross-appealed complaining that Giddens had failed to state a cause of action for violation of Title VII. On December 6, 1993 the Fifth Circuit issued a per curiam decision affirming the judgment in favor of Shell. Giddens had neither alleged nor proved that his employer had treated him differently because he is male.

(ii) Statement of Facts

The following statement of facts is substantially different from that submitted by Giddens. Most of the testimony in this case was highly contested with dramatically different versions of the same events. This statement of facts is based on the evidence which supports the jury's verdict in favor of Shell.

Richard Giddens was employed as an operator at Shell's Odessa Refinery in 1985. (R.vol.3 p.12). He worked on shift and reported to a supervisor. (R.vol.3 p.13).

Giddens was not a popular employee. (R.vol.4 p.155-157). He had problems getting along with other operators. (R.vol.3 p.54). Giddens was intelligent but lacked aggressiveness and desire. Consequently, he fell behind in his training. (R.vol.3 p.168).

In 1988 Jack Tucci became the supervisor of the shift on which Giddens worked. (R.vol.3 p.14). Tucci was a good supervisor who was technically competent and safety conscious. However, Tucci was gruff in his communications and could be demanding. (R.vol.3 p.103-104, 137-138, vol.4 p.142, 146, and 149). Typical of the comments about Tucci is the following testimony.

"Q. What kind of shift supervisor was Tucci?

A. (by Gary Moore, operator and Relief Supervisor) I always thought Jack was one of the better shift supervisors out there. He was always real strong on safety, treated all the people the same. He was kind of gruff, you know, rough talking. A lot of people take that different ways. Some people are more

sensitive to it than others, but he was the same way with everybody."

(R.vol.4 p.142-143)

Predictably, Giddens had a personality conflict with Tucci. (R.vol.3 p.169). Giddens complained that Tucci followed his work too closely and expected too much of him. (R.vol.3 p.166). Giddens had problems accepting criticism from Tucci. (R.vol.4 p.28). Nevertheless, even Giddens admitted that Tucci treated everyone equally. (R.vol.3 p.55). Tucci wrote good evaluations about Giddens's performance. (R.vol.3 p.79).

Tucci was transferred to another shift in 1990 and no longer supervised Giddens on a regular basis. Tucci would be Giddens supervisor only when Giddens split his days off. Even then Giddens would use a day of vacation to avoid working with Tucci. Giddens was teased about this behavior by both Tucci and co-employees. (R.vol.3 p.68-69).

Regrettably, Tucci enjoyed playing practical jokes and had a crude sense of humor. (R.vol.4 p.29-31). Despite a prohibition on "horseplay" in the refinery, Tucci would engage in such activity. Another operator on the shift, Craig Harner, also enjoyed rough humor. Harner enjoyed putting sardines in gloves and "goosing" people. (R.vol.4 p.143).

Giddens himself engaged in practical jokes, including jokes with sexual connotations. (R.vol.3 p.54, vol.4 p. 154). Giddens performed a "french" rope trick which consisted of tying a rope so to resemble a penis. (R.vol.3 p.71-72, vol.4 p.20-21). Giddens also wore T-shirts inscribed "Check My Nuts." (R.vol.4 p.144, 151, and 154-155). Giddens suggested that a female operator had been hired only to do the dishes. (R.vol.4 p.154).

Despite their antagonistic relationship, Giddens made no complaints about his treatment by Tucci, except regarding work issues, until February 1991. Prior to February 1991 Giddens made no complaints that Tucci or Harner were harassing him in any way. (R.vol.3 p.117, 138-141, and 163-168).

On Sunday, February 3, 1991 Tucci and Harner played a practical joke on Giddens. Giddens was sitting at a desk in the control room when Tucci and Harner approached him from either side. Each grabbed an arm and leg and lifted Giddens from the chair and then set him back down. Unknown to Tucci, when Giddens was in the air, Harner released one leg and "diddled" Giddens's butt. At the time everyone in the control room laughed, including Giddens. It was considered "horseplay." (R.vol.3 p.100-102, vol.4 p.34, and 133-134).

The next day Giddens reported the incident to Carl Crawford, the Shift Supervisor and Tucci's boss. Crawford and Giddens then met with Gary Miller, the Process Manager. (R.vol.3 p.29). Miller investigated the incident by first talking to Tucci and Harner. Both admitted their involvement in the incident. Tucci admitted that the incident was "horseplay" and that "horseplay" was prohibited, especially by supervisors. Both Tucci and Harner were suspended pending completion of the investigation. Tucci offered to retire. (R.vol.4 p.120-123).

Miller also talked to two operators who were in the control room on Sunday, Bruce King and Darryl Rives. Upon completion of the investigation, Miller, Steve Cooke, the Employee Relations Manager, and the Refinery Manager decided to fire Harner and accept Tucci's offer to retire. (R.vol.4 p.124-126). Harner had previously been disciplined for "horseplay." Shell viewed the incident as fairly severe

since a supervisor had been involved in a prohibited activity. Therefore Shell decided to terminate both employees. (R.vol.3 p.134-135).

On May 20, 1991 Giddens and Crawford met with Steve Cooke. Crawford was uncomfortable with Giddens's physical and mental condition and felt it was not safe for Giddens to work in the refinery. For the first time Giddens related other incidents of "horseplay" by Tucci, including Tucci rubbing up against him in a bathroom. Giddens was placed on disability leave. (R.vol.3 p.120-122). Giddens has not worked since May 1991. (R.vol.3 p.45-46).

SUMMARY OF THE ARGUMENT

The prohibition against sex discrimination contained in Title VII refers to disparate treatment on the basis of gender, not mistreatment involving sexual connotations. Sex harassment in the form of a hostile work environment is actionable under Title VII only as a form of gender discrimination.

Giddens wants to abandon any link between a hostile work environment and gender discrimination and simply declare that any work environment polluted by references to sexual activity is a violation of Title VII. This simplistic analysis would require the court to rewrite Title VII.

ARGUMENT

1. Should the Supreme Court redefine the prohibition against sex discrimination contained in Title VII of the Civil Rights Act of 1964 to include any mistreatment of any employee, male or female, which involves any sexual connotation?

The basis for subject matter jurisdiction in this case was an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Giddens alleged that he was "sexually harassed" by a supervisor and co-employee when he was subjected to jokes and horseplay with sexual connotations.

On appeal Shell argued, and the Fifth Circuit agreed, that Giddens had not stated a cause of action for violation of Title VII. Giddens neither alleged nor proved that he was singled out because he is male.

In his petition for Writ of Certiorari Giddens argues that he should not have to prove that he was singled out because he is male in order to state a violation of Title VII. Giddens argues that any harassment is a violation of Title VII if it makes any reference to a sexual activity.

(a) "Sex" means gender.

There is a superficial appeal to Gidden's argument. Title VII does prohibit discrimination against any individual because of his "sex." However, "sex" means gender. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

> "Congress' intent to forbid employers to take *gender* into account in making employment decision appears on the face of the statute."

Id. at 239 (emphasis added)

(b) Not all "harassment" is a violation of Title VII.

Obviously not all "harassment" is a violation of the Civil Rights Act. Title VII is not a workplace beautification act. It does not punish any ill treatment of any employee. It merely prohibits disparate treatment based on the sex (gender), race, religion or national origin of an employee. Title VII does not regulate any other quality or characteristic of an employee which may lead to different treatment. *Id.* at 239. There are any number of characteristics not covered by Title VII which may lead to different treatment. An employee may be treated better (or worse) by a supervisor because of the school he attended, the state in which he was born, his personality, etc. An employee mistreated because of any such characteristic would not be able to state a cause of action for violation of Title VII. Title VII is not a general fairness statute.

Of course, references to sexual activity can be a basis for gender discrimination but only if the references create unequal working conditions for one gender. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), recognized that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex (gender) has created a hostile or abusive work environment. *Id.* at 66. The gravamen of the action, however, is that employees of one gender are treated differently from employees of the other gender; i.e., women are subjected to sexual abuse while men are not.

> "Respondent argues, and the Court of Appeals held, the unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate *because of the subordinate's*

> *sex*, that supervisor "discriminate[s]" on the basis of sex."
> *Id.* at 64. (emphasis added).
>
> "As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F.2d 897, 902 (1982):
> Sexual harassment which creates a hostile or offensive environment for *members of one sex* is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."
>
> *Id.* at 66-67 (emphasis added).

Certainly, a male can sue for discrimination in violation of Title VII, even discrimination based on a hostile work environment. However, to do so he must show that he was singled out because of his gender.

(c) Giddens offered no evidence that he was singled out because of his gender.

The Fifth Circuit held that Giddens did not state a cause of action for violation of Title VII because he produced no evidence at trial tending to prove that he had been treated differently because he is male. Giddens does not dispute that he offered no such evidence. However, he argues that he was not required to offer such evidence under *Meritor Savings Bank, FSB v. Vinson, supra*, and *Harris v. Forklift Systems, Inc.*, _____ U.S. _____, 114 S. Ct. 367 (1993).

Meritor Savings Bank held only that a plaintiff did not have to prove a tangible loss of an economic character in order to state a cause of action for sex (gender) discrimination based on a hostile work environment. *Meritor Savings Bank* did not hold that a plaintiff did not have to prove that the mistreatment was directed at the plaintiff because of the plaintiff's gender. *Meritor Savings Bank* did not create a new species of prohibited conduct known as "sexual harassment." *Meritor Savings Bank* merely held that creation of a hostile environment based on sexual activity was a form of gender discrimination.

Similarly, *Harris* merely clarified that sex (gender) discrimination based on a hostile work environment did not have to seriously affect the employee's psychological well-being in order to be actionable. Title VII is violated when the workplace is permeated with the conduct that a reasonable person would find hostile or abusive. *Harris* did not hold that a plaintiff did not have to prove that the conduct was directed at the plaintiff because of the plaintiff's gender.

(d) Giddens offered no evidence of "sex stereotyping."

Finally, Giddens attempts to compare his case to that of the plaintiff in *Price Waterhouse v. Hopkins, supra.* In that case a female employee who was refused admission as partner in an accounting firm offered expert testimony that criticisms of the employee's performance were based on sex stereotyping. The employee was described as needing "a course at charm school" and it was suggested that her interpersonal skills could be corrected by a soft-hued suit or a new shade of lipstick. *Id.* at 256.

Because these comments indicated a stereotyped view of women, they were evidence that the firm was evaluating the employee not on her performance but on her gender.

It is interesting that Giddens cites *Price Waterhouse*. This case clearly holds that Title VII prohibits *gender* discrimination and discusses sex stereotyping as merely some evidence of gender discrimination. There is no suggestion that all offensive sexual remarks are actionable under Title VII.

Giddens offered no evidence of comments made about him that indicated sex stereotyping. Giddens asserts that he did not exhibit the personal characteristics that his superior thought a stereotypical male should possess. Petitioner's Brief at p.3. However, Giddens cites no evidence in the record to support this position. No such evidence was introduced.

(e) Giddens wants to turn Title VII upside down.

Courts have recognized that gender discrimination can take the form of a hostile work environment based on sexual activity. A cause of action alleging gender discrimination in the form of a hostile work environment was analyzed in *Goluszek v. H. P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988), a case which involved facts similar to those presented in this case.

Goluszek had never been married and never lived any where but his mother's home when he went to work for H.P. Smith as a mechanic. His co-workers teased him unmercifully about his lack of sexual experience. The co-workers told Goluszek that they would fix him up with a promiscuous woman, showed him pornographic pictures, accused him of being gay, and made other sex related

comments. The co-workers also threatened to knock him off his ladder and "poked him in the buttocks with a stick." Goluszek reported these actions to his supervisor and the general foreman but they did nothing. In fact, both used profane language in talking to Goluszek. The foreman dismissed Goluszek's claims of harassment as mere "shop talk."

After he was fired, Goluszek filed suit in federal court for violation of the Civil Rights Act.

> "In Count I Goluszek claims that H.P. Smith sexually discriminated against him by refusing and failing to remedy and control the continuous use of sexual harassment directed toward him by fellow employees." 697 F.Supp. at 1455.

In response to a Motion for Summary Judgment by H.P. Smith, District Judge Ann C. Williams carefully analyzed the purpose and intent of the Civil Rights Act. She recognized that discrimination can take the form of sexual harassment either (1) by a quid pro quo demand for sexual favors in exchange for job benefits or (2) by the creation of a hostile work environment. Judge Williams noted that even in a hostile work environment the employee must demonstrate that but for the employee's gender, the employee would not have been the object of harassment.

Applying these principals to Goluszek's allegations, Judge Williams found that the conduct of Goluszek's co-workers and supervisors did not state a claim for violation of the Civil Rights Act.

> "Simply stated, the defendant's conduct was not the type of conduct Congress intended to

sanction when it enacted Title VII. The goal of Title VII is equal employment opportunity. *Connecticut v. Teal*, 457 U.S. 440, 448, 102 S.Ct. 2525, 2531, 73 L.Ed.2d 130 (1982). That goal is accomplished in part by imposing an affirmative duty on employers to maintain a working environment free of discriminatory intimidation. See E.E.O.C. Dec. No. 74-05, 6 Fair Empl. Prac. Cas. (BNA) 834 (1973). The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv.L.Rev. 1449, 1451-52 (1984). Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable. The "sexual harassment" that is actionable under Title VII "is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." Id. at 1451. Actionable sexual-harassment fosters a sense of degradation in the victim by attacking their sexuality. Id. at 1445. In effect, the offender is saying by words or actions that the victim is inferior because of the victim's sex. *Cf. Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986) ("Such severe harassment becomes discriminatory because it deprives the victim (usually female) of the right to

> participate in the work place on equal footing with others similarly situated").
>
> During the times relevant to his claim, Goluszek was a male in a male-dominated environment. In fact, with the exception of the reference to a female employee in the letter, each and every one of the figures in this story was a male. The argument that Goluszek worked in an environment that treated males as inferior consequently is not supported by the record. In fact, Goluszek may have been harassed "because" he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace. *Compare Rabidue [v. Osceola Refining Co.]*, 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting) ("The overall circumstances of plaintiff's workplace evince an anti-female environment"). A wooden application of the verbal formulations created by the courts would salvage Goluszek's sexual harassment claim. The court, however, chooses instead to adopt a reading of Title VII consistent with the underlying concerns of Congress and grants H.P. Smith summary judgment on that claim." 697 F.Supp. at 1456.

The same common sense analysis should be applied to the allegations in this case. Like Goluszek, Giddens is a male in a male-dominated environment. Each and every one of the figures in his story is a male. The argument that Giddens worked in an environment that treated males as inferior is not supported by the record. Giddens may have

been "harassed", but that harassment was not of a kind which created an anti-male environment in the workplace.

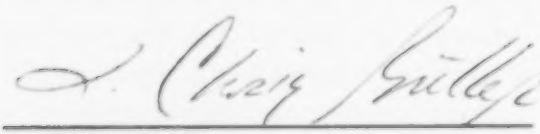
The actions of Tucci and Harner were crude, juvenile and boorish. Their actions were spiked with sexual innuendos. Their actions were certainly reprehensible and were not condoned by Shell. (Harner was fired following the February 3, 1991 goosing. Tucci resigned in lieu of discipline.) However, their actions did not discriminate against men by creating an anti-male environment through sexual harassment. The Civil Rights Act was not intended to police all interpersonal relations within the workplace. Incidents of horseplay do not become violations of the Civil Rights Act just because there is some sophomoric reference to a sexual act.

Giddens wants to stand Title VII on its head. He wants to abandon any analysis based on gender discrimination and simply declare that any mistreatment of any employee, male or female, involving any sexual connotation is a violation of Title VII. To do this would require the Supreme Court to rewrite Title VII and declare that the prohibition against sex discrimination means mistreatment involving sexual references and not gender discrimination. It would be inappropriate for the Supreme Court to take such action.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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